YAU KONG KUI

v.

PUBLIC PROSECUTOR

HIGH COURT, BRUNEI
DENYS ROBERTS J
[CRIMINAL APPEAL NO. 9 OF 1988]
5 JANUARY 1989

CRIMINAL PROCEDURE : *Sentencing - Conviction of dangerous driving causing death - Sentenced to six months imprisonment - Licence endorsed disqualified from driving for a period of 2 years - Appeal against sentence - Factors to be considered when passing sentence.*

The defendant was convicted of a charge of dangerous driving causing death contrary to s. 27(1) of the Road Traffic Act Cap 68. He appeared before the Magistrate on 20 July 1987 and was sentenced to a term of six months imprisonment, his licence was endorsed and he was disqualified from driving for a period of 2 years.

The Magistrate when passing sentence took into account that a deterrent sentence had to be imposed. The defendant appealed originally against both conviction and sentence but at the hearing of the appeal confined his appeal to that of sentence only.

Held:

[1] That imposing a deterrent sentence, although unfair on the accused, was not necessarily incorrect.

[2] However the Court would interfere with the sentence in this case, on the basis that it was a sentence of a deterrent nature and because of the long gap of 16 months between the appearance of the defendant in the Magistrate Court and the subsequent sentencing.

[3] Sentence of 6 months reduced to 2 months imprisonment. The other sentences imposed to remain.

Case referred to:
Reg. v. Boswell [1984] 3 All ER 353

Legislation referred to:
Road Traffic Act [Brunei], s. 27(1)

For the defendant - A.C.W. Abrahams; M/s. Abrahams Davidson & Co.
For the state - Ivan Leong, DPP, Attorney General's Chambers

JUDGMENT

Denys Roberts J:

Preliminary

The defendant, Yau Kong Kui, was charged with dangerous driving causing death, contrary to s. 27(1) of the Road Traffic Act Cap. 68. The offence, to which he pleaded not guilty and of which he was later convicted, took place on 2 February 1987.

Although he first appeared, in front of a Magistrate, on 20 July 1987, it was only on 14 November 1988, 16 months later, that the Magistrate imposed a sentence of imprisonment. It is against that sentence that the appeal is primarily directed, though there is also a subsidiary appeal against the length of disqualification, which was for 2 years.

Facts of Case

The circumstances which lay behind the killing by the defendant of Mrs. Woodford are tragic and there is no doubt that much of the blame for what happened lies elsewhere and not upon the defendant.

Earlier, on the evening of 2 February 1987, a driver and foreman of the Public Works Department had left a roller on the road which leads from Jalan Tunku Baru to Bandar Seri Begawan. The roller was standing a few yards on the Tunku side of an excavation, which had been made by the Public Works Department on the road. After dark, the roller was unlit, although the driver of it insisted that he had placed a number of cones on the road when he left the roller.

It is accepted, however, that at about 7.45 p.m. when Mrs. Woodford, who was driving a car, hit the roller, only two cones were left and there were no lights. Thus the warning which she had of the presence of the roller on the road was limited. As a result of her collision with the roller, she sustained an injury over the eye and her husband, a passenger in the car driven by her, suffered a broken leg.

Not long afterwards, the police arrived and Sgt. Hj. Tusin began to take the appropriate measurements. Mr. Woodford was sent to hospital in an ambulance. Mrs.Woodford, unfortunately, stood behind her car. It was at that point that the defendant, driving his brother's car which he had borrowed, at a speed, according to him, of between 70 and 80 miles an hour, struck first Mrs.Woodford and then her car, which was well into the middle of the road after she had hit the roller. Mrs. Woodford died, probably at once, as a result of the collision between the defendant's car and her.

The defendant was convicted by a Magistrate of dangerous driving causing death and was sentenced to six months' imprisonment. His licence was endorsed and a disqualification from driving for 2 years imposed.

The defendant originally appealed against both his conviction and his sentence. He has abandoned his appeal against conviction, in my view, entirely rightly, since it was clear from the evidence that the Magistrate could properly convict the defendant of the charge which was brought against him. He has, however, through Mr. Abrahams, advanced a number of factors in mitigation of the sentence which were imposed.

Similar Cases

The Magistrate, when passing his sentence, took into account the defendant's age, his previous record and the absence of any aggravating circumstances other than the driving by the defendant at an excessive speed. However, he concluded his remarks on the subject of sentence by saying that there had been an increasing number of serious accidents resulting in death and severe injuries of the state over the last few years. This may very well be so, but there does not appear to be any evidence of this. It would be helpful to Magistrates, as indeed it would to this Court, if, on some future occasion, the police, or the prosecuting officer, were to present to the Magistrate some statistics which show the number of road accidents which have taken place in recent times.

Deterrent Sentence

One of the stronger arguments advanced on behalf of the defendant has been the absence of custodial sentences in Brunei in cases of a similar nature. In all those which have been uncovered by the diligence of Counsel, only a fine has been imposed and apparently the period of disqualification has not exceeded 12 months in any of them. The Magistrate concludes his remarks by saying "a deterrent sentence must be imposed". As I understand the word "deterrent", it means that a sentence, which is higher than that which would normally be proper for the offence concerned, is to be imposed on the defendant, not necessarily because of the facts of his case but in order that others should be dissuaded in the future from committing offences of a similar kind. This much necessarily involve a degree of unfairness to the defendant concerned, since he, in such an event, is receiving a sentence which might be less if he were to be sentenced on his own merits alone. This is what apparently happened to the defendant in this case.

However, such a course is not necessarily incorrect. The sentences imposed before may have been too low. And, in addition, the time may well have come for the imposition of a sentence of the kind I have described.

Before I can interfere with the sentence that was passed upon the defendant, in any event, I have to be satisfied that, in the circumstances, it was manifestly excessive.

The Court of Appeal, Criminal Division, England, in 1984, considered in *Reg. v. Boswell* [1984] 3 All ER 353, the circumstances which a Court should bear in mind when deciding whether a custodial sentence should be imposed, if there has been a conviction for the offence of causing death by reckless driving, which appears to be much the same as dangerous driving causing death, contrary to s. 27(1) of the Road Traffic Act of Brunei Darussalam.

One of the factors, and it is by no means the only one, which a Court should take into account is the speed at which the defendant was driving at the time of the accident which caused death. In this instance, it is beyond doubt that, even on his own evidence, the defendant was driving at a speed which was grossly excessive in the circumstances. Nor can it be said that his blameworthiness was substantially reduced by his attempt, at the last minute, to brake.

I am satisfied that there are some circumstances in which an excessive speed, by itself, is sufficient, if it leads to death to support a sentence of imprisonment for dangerous driving causing death under s. 27(1).

Among the factors which are mentioned in *Reg. v. Boswell* as amounting to a mitigation of the offence, a number were taken into account by the Magistrate. However, included in these are a plea of guilty and a show of genuine remorse, neither of which, from the record, seems to have occurred.

Suspension of Sentence

It is, of course, within the discretion of the Magistrate to suspend a sentence of imprisonment if he wishes to do so, but this is a power which should be exercised with care. The days when no Judge was available in Brunei Darussalam to hear an appeal for some months are gone; and a Magistrate should not suspend a sentence of imprisonment, save in unusual circumstances, for example, if, in his view, there is a substantial point of law involved and the defendant has a good chance of success on appeal.

Delay

I am much influenced, however, by the fact that the defendant has had this charge hanging over him since 2 February 1987, that is for over 21 months before sentence by a Magistrate. This is a length of time which is, on the face of it, difficult to excuse for an offence of this nature. I feel obliged to give considerable weight to this factor in deciding whether the sentence imposed was excessive.

There is alas, nothing on the record to show that any sense of urgency was present and I cannot absolve defence Counsel (who did not appear on the appeal) from this comment.

The facts were described by the Magistrate "as amounting to a bad case of dangerous driving". With this I cannot disagree, Nor can I say that a sentence of imprisonment was manifestly excessive. There are many cases, on the authority of Boswell, in which a custodial sentence is proper for an offence of this kind.

I am, however, disposed to interfere with the sentence for two reasons.

Firstly, because this is a sentence of a deterrent nature, in the sense that no similar sentence has been imposed in the past, though I think it should be the normal punishment for driving of this kind.

Secondly, because of the long gap of 16 months between the appearance of the defendant in the Magistrates' Court and the sentence which was imposed by him.

I cannot disagree with the Magistrate that an immediate custodial sentence of imprisonment is a correct one, nor with his endorsement of the licence, nor with his disqualification of the defendant from driving for 2 years.

Because of the factors which I have mentioned, however, while I am left in no doubt that some custodial sentence is necessary, I consider that the sentence of six months can properly be reduced to one of two months and I order accordingly. The other sentences imposed by the Magistrate will stand.

Also found at [1989] 1 CLJ 1020

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